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In The

Supreme Court of the United States

October Term, 1971

No. 71-382

GILES A. WANAMAKER, Jr.,

Petitioner,

vs.

JOHN C. RILEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Giles A. Wanamaker Jr., appearing in propria persona, hereby petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review an Order affirming an Order Granting Motion for Summary Judgment by the United States District Court for the Eastern District of Michigan.

Opinions and Orders Below

The opinions and orders below were not officially reported. The Order of the United States Court of Appeals for the Sixth Circuit, containing a reference to Judge Wade McCree's dissent therein, was filed on June 17, 1971, and a copy is annexed hereto as Appendix "A". The Order for Summary Judgment by the United States District Court (E.D. Michigan) by Judge Fred W. Kaess was entered August 26, 1970 and a copy is annexed hereto as Appendix "B".

Jurisdiction

The order sought to be reviewed herein was handed down and filed on June 17, 1971. There were no orders or petitions respecting either a rehearing or an extension of time to petition for certiorari. It is believed that this Court has jurisdiction to review the order below pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Questions Presented

1. Is an opinion by only four justices of the United States Supreme Court, which advocates an absolute privilege against suit for nearly all federal government officials when making defamatory statements but found to be acting within the "outer perimeter" of their duties, controlling precedent under the doctrine of stare decisis and thus entitled to be recognized as the law of the land?

2. Assuming arguendo an absolute privilege against suit for federal employees is recognized under the circumstances of this case,

a) was defendant-respondent acting in his official capacity in making the defamatory statements attributed to him?

and

b) was a fair and adequate evidentiary hearing or other opportunity to determine the issue of official capacity afforded the court and the parties at the trial court proceeding?

Petitioner contends that the answers to the questions are "No."

Statement of the Case

Petitioner-plaintiff filed the complaint, a copy of which is annexed hereto as Appendix "C", in the instant matter on May 5, 1969, in the circuit court of Macomb County, Michigan, alleging defamation by slander (Count 1) and abuse of process (Count 3) against Respondent-defendant John C. Riley, and defamation by libel (Count 2) against former defendant Robert Hlatky. The action was removed to the United States District Court for the Eastern District of Michigan by the United States Attorney pursuant to 28 U.S.C. 1441 et seq. on the grounds that respondent was acting in his role as an official of the United States government. Petitioner subsequently consented to the dismissal of the action as to defendant Hlatky.

Respondent's motion for summary judgment was granted by the District Court upon the finding that respondent was acting within the 'outer perimeter' of his duties as an official of the United

States government, and was therefore accorded an absolute privilege against such actions. Petitioner appealed to the U. S. Court of Appeals for the Sixth Circuit from only so much of the judgment as applied to the slander count (Count 1); with McCree, J. dissenting, the District Court was upheld.

Petitioner comes now petitioning this honorable Court for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit.

Statement of the Facts

On January 26, 1968, petitioner, an attorney then residing and practicing in Michigan, and a major in the Air Force Reserve, was one of approximately 185 members of the 305th Air Rescue and Recovery Squadron, a reserve unit based at Selfridge AFB, Michigan, who were involuntarily recalled to extended active duty for an unknown length of time in the aftermath of the Pueblo incident in which a U.S. Navy ship and its crew were captured by the North Koreans. Respondent, who was employed at Selfridge Air Force Base as the supervisor of approximately 70 civil service employees of the 305th, known as Air Reserve Technicians, was a reserve lieutenant colonel and commander of the unit.

According to the pleadings and the record, on or about December 24, 1968, and at other times, respondent made a number of defamatory statements to citizens of Michigan concerning petitioner, including but not limited to the following: "Major Wanamaker is a traitor to his country." "He is a modern-day Benedict Arnold and is a disgrace

to the uniform." "I want to bar him from the practice of law."

The record shows that respondent in his Answer to the Complaint denied making the foregoing statements, but his answer to certain interrogatories reflects that he does not recall making them. In his affidavit in support of the motion for summary judgment filed with the District Court, respondent stated that any statements concerning petitioner were made in his (respondent's) capacity as an Air Force officer.

Argument

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI (A) TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT; (B) TO RESOLVE A CONFLICT BETWEEN COURTS OF APPEALS ON THIS MATTER; AND (C) TO REVERSE THE SANCTION OF A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A) On the "authority of Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) and Molevar v. Lindsey, 411 F.2d 597 (6th Cir. 1969)" (see Appendix 'A', p. 1a), the Court of Appeals for the Sixth Circuit in a 2 - 1 decision upheld the District Court's summary judgment order, which also cited Barr as its authority. It is the contention of petitioner that the opinion in Barr relied upon by the courts below is not settled law and that the summary judgment should not have been granted.

Five separate opinions were announced in Barr. The decision of the court consisted of two concurring opinions, one by Mr. Justice Harlan in which three other justices joined, as well as an opinion by Mr. Justice Black in which he specifically disassociated himself from Mr. Justice Harlan's opinion, although concurring in the result, 360 U.S. at 576. Four justices dissented in three separate opinions. Thus, an opinion by only four of the justices, in which an absolute privilege against lawsuits was advocated for a large number of federal employees when found to be acting in the course of their duties, seems to have been escalated into a binding rule of law when in fact the so-called 'rule' is neither settled law nor is entitled to binding precedent under the doctrine of stare decisis.

A mainstay of the Anglo-American legal system and its reliance on judicial precedent, the doctrine of stare decisis holds that the determination of a point of law by a court will generally be followed by a court of the same or lower rank if a subsequent case presents the same legal problem. 20 Am. Jur.2d, Courts §183. The stare decisis effect is limited to a judicial opinion of a majority of the court on a point of law in a final decision, supra, §189, and

> . . . where the members of the court unanimously or by majority vote reach a decision but cannot, even by a majority, agree on the reasoning therefor, no point of law is established by the decision and it cannot be a precedent covered by the stare decisis rule. Supra, §195.

See also State v. Smith, 422 SW 2d 50 (Mo. 1965), cert. denied, 393 U.S. 895, and Off v. United States, 35 F.2d 222 (S.D. Ill. 1929). According to Corpus Juris Sequndum, where a majority of a court concurs merely in the result, the principles enunciated in the opinion cannot be considered as within the rule of stare decisis . . . 21 C.J.S., Courts §189 a.

> Only an opinion which is concurred in by at least a majority of the court of last resort constitutes a precedent; if fewer than the majority concur there is no ruling opinion except as to the disposition of the case. id at §189 c.

In the circumstances of the instant case, therefore, the reliance upon the courts below upon Barr and upon Molevar v. Lindsey, supra, is misplaced, as the four justice opinion in Barr is not entitled to binding precedent, and the opinion in Molevar, citing Barr as its authority, cannot express the law of the Sixth Circuit. As this important question of federal law has not been settled by this honorable Court, petitioner respectfully urges that this petition be granted.

B) A conflict between Courts of Appeals is apparent in an examination of Kelley v. Dunne, 344 F.2d 124 (1st Cir. 1965). In that case the First Circuit does not follow the absolute privilege rule as is articulated in Molevar v. Lindsey, supra, Ruderer v. Meyer, 413 F.2d 175 (8th Cir. 1969), and other cases. Chief Judge Aldrich establishes a "balancing" criteria involving the weight of the relative importance in each case

of the public interest (absolute privilege for the federal employee) as opposed to the private interest (the ability to obtain a measure of redress). "In such a situation we see no compelling need to superimpose, absolutely, the public interest upon private rights." (emphasis added), 344 F.2d 129 at 133.

That the First Circuit has reserved the full adoption of the absolute privilege rule is further seen in this citation from Denman v. White, 316 F.2d 524 (1st Cir. 1963):

> We intimate no view as to whether the privilege accorded a government official by Barr . . . would permit a collateral personal attack upon the party he is seeking to answer when the latter's character is not directly in issue. id at 526.

The First Circuit, therefore, has not adopted the absolute privilege rule as articulated by the Sixth Circuit in Molevar v. Lindsey, supra, and the instant case. Petitioner respectfully prays that this Honorable Court grant this petition to resolve that conflict.

C) In the dissenting comment to the Opinion below, Circuit Judge McCree would have remanded the matter to the District Court . . . "for an evidentiary hearing to determine whether the utterances were made 'within the outer perimeter' of the duties . . ." Appendix p.1A. Petitioner contends that, in the circumstances of this case, without such a hearing petitioner-plaintiff has been precluded from an effective inquiry into the factual

issue of whether the statements were made in an official capacity. "Since . . . motions for summary judgment requir(e) construction in plaintiff's favor," Kelley v. Dunne, supra, at 130, "Defendant officers may not rely, of course, on bare conclusory allegations on this issue, for this will not sustain a summary judgment in their favor." Bridges v. I.R.S., 433 F.2d 299, 300 (5th Cir. 1970).

The record in the instant case shows that respondent-defendant's motion for summary judgment contained the following conclusory allegation as a part of respondent's affidavit: "9... That any statements made by me concerning Major Wanamaker were made solely in my capacity as an officer in the United States Air Force and as Major Wanamaker's Commanding Officer." Petitioner-plaintiff introduced a number of affidavits showing that the utterances were made in casual conversations, in personal contexts, in civilian clothes, after duty hours, and on a holiday. One affidavit, by a Michigan attorney, states that respondent-defendant, while dressed in civilian clothes, made the following statement: "Come inside, Mac, I want to discuss something personal. It's (obscenities . . .) important to me or I wouldn't take up your time on a holiday . . . Al Wanamaker has embarrassed me personally. He's a traitor to his country and a modern day Benedict Arnold. I want to bar him from the practice of law. If you're smart Mac, you'll help me protect my tail and cover up this mess."

Petitioner contends that the record contains sufficient evidence to rebut respondent's bare self-

serving affidavit, introduced with no support. In Denman v. White, supra, a similarly claimed privilege was upheld on motion, but with affidavits from two generals, one an immediate commander of defendant, together with a copy of the appropriate Air Force regulation authorizing the activity. No such support was proferred here. It remains the respondent-defendant's burden to show his entitlement to executive immunity, and there is no presumption to aid him. Prosser, Torts, §111 at 823 (3d Ed. 1964). Respondent-defendant's affidavit, if it is relied upon exclusively in its present form, creates a presumption that the statements were within the scope of duty unless plaintiff can prove otherwise, . . . an impossible burden. See Barr, supra, at 579, Chief Justice Warren's dissent.

Petitioner respectfully contends that the refusal of the Court of Appeals below to remand the proceedings for an evidentiary hearing sanctioned a departure from accepted and usual judicial proceedings in that a bare conclusory affidavit, with no supporting affidavits or material, defeated petitioner's reply to the motion even though it was amply supported by three affidavits, any one of which were sufficient to put the matter into issue. An unsupported affidavit by the respondent thus becomes the basis for an outcome — determinative decision by the trial court.

Conclusion

For the foregoing reasons, together with the parallel rationale expressed by the court and the concurrence in Bivins v. Six Unknown Named

Agents, _____U.S._____, 91 S. Ct. 1999, 29 L. Ed. 619 (1971), this petition for a Writ of Certiorari should be granted, and the Court should reverse the determination of the court below on the basis that there is no settled or binding rule of absolute privilege controlling the instant matter, that the alleged utterances were made outside of respondent's scope of duty, or, alternatively, that there should have been an evidentiary proceeding to determine the scope of duty issue at the trial court.

Respectfully submitted,

GILES A. WANAMAKER, JR.
In Propria Persona

APPENDIX A

Order Appealed From

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed June 17, 1971

GILES A. WANAMAKER, JR., :

Plaintiff-Appellant :

vs. :

JOHN C. RILEY, :

Defendant-Appellee :

Before PHILLIPS, Chief Judge, WEICK and McCREE, Circuit Judges.

Appellant is a Major in the Air Force Reserve and has been on duty at Selfridge Air Force Base in Michigan since his unit was activated. He brought an action for damages for defamation against his commanding officer, a Colonel in the Reserve, the action arising out of utterances made by the Colonel at the Base, concerning appellant's activities as a dissident, which activities questioned the call to active duty and were reported in the press, on television and through other news media.

The District Court granted summary judgment on the ground that the utterances of the commanding officer were absolutely privileged.

Order Appealed From

We affirm on the authority of Barr v. Matteo, 360 U.S. 564 (1959), and Molever v. Lindsey, 411 F.2d 597 (6th Cir. 1969).

Judge McCree dissents. While he recognizes the existence of absolute privilege of the commanding officer, he would remand for an evidentiary hearing to determine whether the utterances were made "within the outer perimeter" of the duties of the commanding officer.

Entered by order of the Court.

s/ James A. Higgins
Clerk

APPENDIX B

Order Granting Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Order entered August 26, 1970

GILES A. WANAMAKER, JR., :

Plaintiff, :

v. :

JOHN C. RILEY AND ROBERT HLATKY, :

Defendants. :

At a session of said court held in the Federal Building in the City of Detroit, Michigan, on the 26th day of August, 1970.

Present: The Honorable FRED W. KAESS, United States District Judge.

This case involves a three-count complaint against two defendants. Count One charges defendant Riley with defamation by slander. Count Two charges defendant Hlatky with defamation by libel. Count Three alleges abuse of process on the part of defendant Riley.

Count Two having previously been dismissed with the consent of counsel, the present motion for summary judgment concerns only Counts One and Three.

Order Granting Motion for Summary Judgment

It is the position of the United States, on behalf of the defendant John C. Riley, that any defamatory statements alleged in Count One of the complaint, as well as any actions taken by him to discipline the plaintiff alleged in Count Three, were clearly within the perimeter of defendant's duties as a commanding officer of the United States Air Force; and that, as such, they were absolutely privileged, thus precluding any recovery by the plaintiff in this action.

The plaintiff counters by maintaining that there is no federal absolute privilege in favor of the defendant; and that, assuming arguendo there is such a privilege, it is not available in the instant case because the statements and actions of the defendant Riley were outside the perimeter of his duties.

This kind of case, as frequently has been observed, touches upon the conflict between two considerations of high importance, namely, on the one hand the protection of the individual citizen against damage caused by oppressive or malicious action on the part of government officers; and on the other, the protection of the public interest by shielding responsible governmental officials against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. Barr v. Matteo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert denied, 339 U.S. 949.

Order Granting Motion for Summary Judgment

This court, too, has struggled with this conflict reflecting upon the various cases cited by counsel which involve a variety of factual situations.

The court concludes, however, that the case at bar falls within the rule laid down in Barr v. Matteo, supra — that the defendant's plea of absolute privilege must be sustained.

Relative to Count Three, the action taken was clearly within the perimeter of the defendant's duties as the commanding officer of the 305th Air Rescue and Recovery Squadron stationed at Selfridge Air Force Base. As the commanding officer, defendant Riley was responsible for the maintenance of proper discipline and it was surely within his discretionary power to request an investigation and subsequent court martial action against those under his command, "despite the allegations of malice." Gregoire v. Biddle, supra, at p. 525.

The question of slanderous statements in Count One is a close one, but the court holds that such statements were made within the discretionary authority of the defendant. That the defendant was not required by law or by direction of his superiors is not controlling, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts. In this instance, the statements complained of, as stipulated by the plaintiff in open court, were made by the defendant to other

military personnel while on the premises of Selfridge Air Force Base. While the language used was stronger than necessary, defendant Riley's statements are within the outer perimeter of his duty to maintain discipline and inform those under his command of proscribed conduct. Such internal statements constitute a part of the defendant's official duties and consequently come under the protective shield of absolute privilege.

As a final consideration the court quotes the final paragraph of the Supreme Court's opinion in Barr v. Matteo, supra:

> We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the

executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings."

Therefore, IT IS ORDERED that defendant's Motion for Summary Judgment be granted.

s/ Fred W. Kaess
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition were served upon counsel for the respondent by depositing same properly addressed with postage prepaid in the United States Mail on this day of September, 1971.

APPENDIX C

Original Complaint

Complaint of Petitioner in the Circuit Court for Macomb County, Michigan - filed May 5, 1969

State of Michigan

In the Circuit Court For the County of Macomb

Giles A. Wanamaker Jr.,

Plaintiff

No. X-69-1991

vs. Noe

John C. Riley and
Robert Hlatky,

Defendants

NOW comes the plaintiff in the above entitled matter, GILES A. WANAMAKER, Jr., in proper personam, and for a cause of action says:

COUNT 1 DEFAMATION (SLANDER)

1. THAT plaintiff is a resident of the City of Northville, County of Oakland, State of Michigan.

2. THAT defendant RILEY is a resident of the City of Utica, County of Macomb, State of Michigan and that defendant HLATKY is a resident of Selfridge AFB, County of Macomb, State of Michigan.

Original Complaint

3. THAT on certain occasions in November of 1968 and on certain occasions subsequent and in particular on December 24, 1968, in the presence of others, defendant RILEY made defamatory statements concerning plaintiff, including but not limited to the following: "Major Wanamaker is a modern Benedict Arnold . . . . . Major Wanamaker is a traitor to his country . . . . . (a crime punishable by death in both Federal and State jurisdictions).

4. THAT the above and other statements were made wilfully, falsely and with the malicious intent to do serious and permanent damage to plaintiff, such statements being made in Macomb Co.

5. THAT as a proximate result of defendant RILEY'S malicious slander, plaintiff has suffered permanent and substantial damage to reputation, present and future earning capacity, professional status, military career, and has endured great mental suffering and anguish.

(Counts II and III having been dismissed with the consent of petitioner, they are omitted from this Appendix)

WHEREFORE plaintiff claims judgment against defendant RILEY in the sum of five hundred thousand dollars ($500,000.00) compensatory damages and five hundred thousand dollars ($500,000.00) exemplary and punitive damages together with costs of this litigation and claims judgment against defendant HLATKY in the sum of one hundred thousand ($100,000.00) dollars compensatory dam-

ages and one hundred thousand ($100,000.00) dollars punitive and exemplary damages together with costs of this litigation.

s/ Giles A. Wanamaker, Jr.

GILES A. WANAMAKER, JR.
in proper personam
435 Welch Road
Northville, Michigan
349-0504

Date: May 5, 1969

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No. 71-382

In the Supreme Court of the United States

OCTOBER TERM, 1971

GILES A. WANAMAKER, JR., PETITIONER

v.

JOHN C. RILEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-382

GILES A. WANAMAKER, JR., PETITIONER

v.

JOHN C. RILEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a major in the Air Force Reserve and member of an activated reserve unit, brought this action in a Michigan state court. The complaint had two counts against respondent, his commanding officer: (1) defamation based on alleged defamatory statements about him made at Selfridge Air Force Base, Michigan, to other members of the unit; (2) abuse of process for alleged wrongful initiation of disciplinary proceedings.[1] The cause was removed to the United States

[1] In a third count, petitioner alleged that defamatory statements were made about him by another superior officer who was joined as a co-defendant. This count was later dismissed under a consent order.

447-780—71

District Court for the Eastern District of Michigan under 28 U.S.C. 1442(a)(1).

In support of the defamation count, petitioner alleged that, in the latter part of 1968, respondent told others that "Major Wanamaker is a modern Benedict Arnold" and that "Major Wanamaker is a traitor to his country" (Pet. App. 9a). With respect to the abuse of process count, he claimed that respondent had wrongfully caused an investigation to be initiated against him, and had attempted to have him court-martialed.

Respondent moved for summary judgment and dismissal of the complaint on the ground that the alleged statements and activities complained of were made in connection with his official duties and were therefore absolutely privileged. He filed an affidavit stating that he was commanding officer of the 305th Aerospace Rescue and Recovery Squadron at Selfridge Air Force Base, Michigan, at the time in question; that petitioner was assigned to his unit which had been activated; that public statements and activities by petitioner criticizing the activation of the squadron were in his opinion having a detrimental effect upon his command and upon the reserve program as a whole; and that his statements and activities respecting petitioner were made by reason of his position as commanding officer.

Petitioner filed various affidavits. They showed that respondent's allegedly defamatory statements had been made to various members of the unit in the squadron-orderly room and on the Selfridge Base; that the

remarks had been made in connection with certain television and newspaper reports of dissension within the squadron; and that they were made both during and after regular duty hours. Petitioner also filed a deposition of one unit member[2] which showed that respondent's statements were made in the following context:

> I remember, probably in December of '68, a news report. Colonel Riley and some staff members, Sergeant Nice and Airman Sienel, a clerk-typist from personnel and myself were discussing this newscast that referred to a bunch of dissident reservists at Selfridge headed by Major Wanamaker. It was a rather lively discussion about the newscast. At this time Colonel Riley referred to Major Wanamaker [as a modern day Benedict Arnold].
>
> * * * * *
>
> [He used other language] to the effect that for every bad apple in a barrel, you have got a bunch of good ones. He didn't want one bad apple to spoil the good ones.

The deposition further indicated that the unit had been activated in response to the Pueblo incident, but had not performed duties in connection with that affair. The dissidents, headed by petitioner, were objecting to the continued activation of the unit under these circumstances, and had brought their opinions to the public through the news media.

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[2] Relevant excerpts from this deposition are reproduced in the appendix to respondent's court of appeals' brief, a copy of which is being lodged with the Clerk of this Court.

At the hearing on respondent's motion to dismiss, petitioner admitted that his complaint was based entirely upon statements made by his commanding officer at Selfridge Field and within his own reserve unit group.

The district court, relying on *Barr* v. *Matteo,* 360 U.S. 564, and *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949, dismissed the complaint on the ground that respondent, as commanding officer, was responsible for the discipline of his unit and his statements and actions while acting in that capacity were absolutely privileged (Pet. App. 3a–7a). Noting that "the language used was stronger than necessary," the court nevertheless held that respondent's "statements are within the outer perimeter of his duty to maintain discipline and inform those under his command of proscribed conduct. Such *internal* statements constitute a part of the defendant's official duties and consequently come under the protective shield of absolute privilege" (Pet. App. 6a; emphasis in original).

Petitioner took an appeal only from the dismissal of the defamation count, and the court of appeals affirmed on the basis of *Barr* v. *Matteo, supra* (Pet. App. 1a–2a).

1. Petitioner argues here, as he did below, that reliance on *Barr* v. *Matteo,* 360 U.S. 564, is misplaced because the plurality opinion in that case failed to command a majority of the Court and thus "is neither settled law nor * * * entitled to binding precedent under the doctrine of *stare decisis*" (Pet. 6). We do

not agree. The rule that emerged from *Barr* is that statements by federal officials made within the outer perimeter of their official duties are entitled to absolute immunity. Whatever their other differences, five members of the Court agreed that such an absolute privilege must be recognized in the absence of a federal statute to the contrary. The lower federal courts have since consistently followed *Barr*.[3]

2. In the circumstances of this case, the courts below properly held that *Barr* applies. See also *Howard*

---

[3] See *Denman* v. *White*, 316 F. 2d 524 (C.A. 1); *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Keiser* v. *Hartman*, 339 F. 2d 597 (C.A. 3), certiorari denied, 381 U.S. 934; *Bowman* v. *White*, 388 F. 2d 756 (C.A. 4), certiorari denied, 393 U.S. 891; *Chafin* v. *Pratt*, 358 F. 2d 349 (C.A. 5), certiorari denied, 385 U.S. 878; *Molever* v. *Lindsey*, 411 F. 2d 597 (C.A. 6); *Scherer* v. *Morrow*, 401 F. 2d 204 (C.A. 7), certiorari denied, 393 U.S. 1084; *Ruderer* v. *Meyer*, 413 F. 2d 175 (C.A. 8), certiorari denied, 396 U.S. 936; *Urbina* v. *Gilfilen*, 411 F. 2d 546 (C.A. 9); *Chavez* v. *Kelly*, 364 F. 2d 113 (C.A. 10); *David* v. *Cohen*, 407 F. 2d 1268 (C.A.D.C.).

Petitioner is not correct in his asssertion that *Kelley* v. *Dunne*, 344 F. 2d 129 (C.A. 1), "does not follow the absolute privilege rule" (Pet. 7). In *Kelley*, it was alleged that a postal inspector had forceably entered a private home asserting that he had a warrant charging the owner with robbery, when he knew he had no such warrant. The court concluded that the absolute privilege did not apply since the conduct of the postal inspector was not within the outer perimeter of his duties. The court reasoned that (344 F. 2d at 133) "[t]here would be no serious hamstringing of the activities of postal inspectors if, in the absence of a warrant, they were obligated, to some extent, to defend their actions." Thus that decision did not reject *Barr* but merely turned on the First Circuit's conclusion that the conduct involved was not within the outer perimeter of the official's duties.

v. *Lyons*, 360 U.S. 593. The respondent's allegedly defamatory statements came within the outer perimeter of his official duty to maintain discipline and morale within his unit as commanding officer. Perhaps, as the district court stated, the statements were "stronger than necessary," but they nevertheless were made as a part of respondent's responsibilities as commanding officer.

Nor is petitioner correct in his claim that the question whether respondent's statements were made within the outer perimeter of his duties was for a jury to decide. Petitioner does not contest that the alleged statements were made by his commanding officer to other members of the unit on the Air Force Base where they were stationed. Nor has he rebutted respondent's affidavit that the allegedly defamatory remarks were a direct response to petitioner's public criticism of the unit's activation, and were made by respondent in his capacity as commanding officer in order to maintain discipline and morale within the unit. In these circumstances, there was no genuine issue of material fact to be submitted to, and resolved by, a jury. See *Denman* v. *White*, 316 F. 2d 524, 527, n. 2 (C.A. 1); *Preble* v. *Johnson*, 275 F. 2d 277, 279 (C.A. 10).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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In The

Supreme Court of the United States

October Term, 1971

No. 71-382

GILES A. WANAMAKER, Jr.,

Petitioner,

vs.

JOHN C. RILEY,

Respondent.

REPLY BY PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-382

GILES A. WANAMAKER, JR.,

Petitioner,

v.

JOHN C. RILEY,

Respondent.

Reply by Petitioner

To Memorandum for the Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Chief Justice and Associate Justices of the United States Supreme Court.

Petitioner respectfully submits this Reply Brief pursuant to Rule 24(4), U.S. Supreme Court Rules, in reply to arguments raised in respondent's memorandum.

Stare Decisis

The Solicitor General raises the argument, in opposition to petitioner's point that the four-justice opinion in Barr v. Matteo, 360 U.S. 564, is not entitled to binding precedent under the doctrine of stare decisis (Pet. 6, 7), that "Whatever their other differences, five members of the Court agreed that such an absolute privilege must be recognized..." (Resp. 5). A careful reading of Mr. Justice Black's concurrence in Barr belies the Solicitor General's position:

> Mr. Justice Black, Concurring:
>
> I concur in the reversal of this judgment but briefly summarize my reasons because they are not altogether the same as those stated in the opinion of Mr. Justice Harlan. 360 U.S. at 576.

At no point in Justice Black's opinion is there any reference to or any mention of absolute privilege, executive immunity, or the establishment of any rule encompassing any such privilege. The language of the concurrence is clear in this respect. The Solicitor General does not contest (Resp. 4) the authorities cited by petitioner supporting the doctrine of stare decisis (Pet. 6, 7). So if a "rule...emerged from Barr..." (Resp. 5), it was clearly not entitled to be recognized as binding precedent. Assuming arguendo that the lower federal courts have followed the Barr "rule," (Resp. 5), this is certainly a compelling argument for this Court to grant this petition to provide the lower courts with the appropriate direction to which they are entitled.

Conflicting Courts of Appeals Decisions

Despite the Solicitor General's argument that Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) did not reject Barr (Resp. 5, n. 2), the language of the decision makes it clear that the Harlan opinion in Barr was not followed. Chief Judge Aldrich reasoned that

> "[S]ince the doctrine of absolute immunity is based upon the relative importance of the public, as against a private, interest, application of the doctrine must vary with the relative weight of the competing interests." (Emphasis added.) 344 F.2d at 133.

Such a varying of the application of the doctrine according to "relative weight" does not follow Justice Harlan's opinion in Barr, which resolved the conflict entirely on the side of the public interest without any possibility of a varying of the elements. But Judge Aldrich goes on to say "In such a situation we see no compelling need to superimpose, absolutely, the public interest upon private rights." (Emphasis added.) 344 F.2d at 133 (Pet. 8). It is clear from the foregoing language that the Solicitor General is in error in his assertion that Kelley v. Dunne turned on a conclusion that the conduct involved was not within the official's duties, when the court specifically rejected the rationale of the Harlan opinion in Barr by the above statements.

As further support for the petitioner's assertion that the First Circuit has not adopted the absolute privilege rule as enuciated in Barr, see Comment,

Legislative Immunity, 77 Yale L.J. 366 (1967) at 388 n. 135: "For an intimation that lower courts may have found Barr too much to take, see Kelley v. Dunne...." Also see the discussion of Denman v. White, 316 F.2d 524 (1st Cir. 1963) on page 8 of the Petition. The courts of appeal are thus not uniform in their interpretation of Barr, and this Court should grant the petition to provide the proper guidance to the courts of appeal.

Summary Judgment Procedures and the Facts

Respondent through the Solicitor General argues that "there was no genuine issue of material fact to be submitted to, and resolved by, a jury" (Resp. 6). Such a conclusion is ill-founded and has no basis, as demonstrated by the following factors:

a. Petitioner has never requested a jury trial, and the record so reflects.

b. It appears to be a specious argument to conclude that there are no genuine issues of material fact (Resp. 6), when Judge McCree of the Sixth Circuit would remand for "an evidentiary hearing" to determine the factual issues in dispute (Pet App. 2a). Clearly if an appellate judge even in dissent can conclude that an evidentiary hearing is required, there are appropriate issues for the trier of facts to consider.

c. The trial judge in the Order Granting Motion for Summary Judgment, apparently had many reservations in his opinion. "This court, too, has struggled with this conflict... The question of slanderous statements in Count One is a close one..." (Pet. App. 5a). With these reservations

apparent at the district court level, and the dissent in the appellate court, the presumption in a summary motion proceeding that the facts must be considered that are most favorable to the respondent (on the motion) was not followed.

d. The trial judge in his Order made a finding of fact that "...the language used was stronger than necessary..." (Pet. App. 6a), however at no point did he define the term "necessary." If that term meant a necessity to maintain discipline, then clearly his decision was inconsistent with his finding, and respondent was in fact acting outside his scope of duty.

e. The Solicitor General's memorandum, purporting to argue that there are no genuine issues of material fact, solely treats the facts in four of the six pages of the memorandum. Absent from the memorandum, and from the record, is any attempt by respondent to define as a matter of fact the 'the outer perimeter' of respondent's duties. One way to do so would be to cite the Uniform Code of Military Justice, 10 USC 801 et seq. Article 15 of the UCMJ is the section which enumerates the specific duties of a military commander with respect to the maintenance of discipline and the punishment allowable for infractions.[1] Another way would be to file affidavits

---

1. (b). . . any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses. . . (1) upon his officers of his command . . . 10 U.S.C. 815 (b).

It is clear that the above sets forth the standard for maintaining discipline. It follows that any other method, especially tortious conduct, is outside the commander's scope of duty.

of superior officers ratifying the disputed conduct, or to cite regulations or internal memoranda on the subject as was done in Denman v. White, supra, by the defendant. But none were filed or cited herein and the burden is upon respondent to support his motion in a summary judgment proceeding. See Petition p. 10. It is clear that respondent has not met his burden, and, assuming arguendo the Harlan opinion in Barr is upheld as a rule, the instant case should nevertheless be remanded for a factual determination of the limits of the scope of respondents duty.

f. The record shows ample material in the rebutting affidavits filed by petitioner either to reverse or to require an evidentiary hearing, despite respondent's assertion that there were no genuine issue of material fact (Resp. 6). Petitioner has filed sworn affidavits by independent witnesses that the statements were personal, informal and made in a casual context. One affidavit stated ". . . Al Wanamaker has embarrassed me personally." (emphasis added). See Petition p. 9.

In the court of appeals Reply Brief at p. R10, on file with the Clerk of this Court,[2] petitioner set forth extensive material rebutting the arguments for privilege set forth by the Solicitor General (Resp. 6). Those to whom respondent made the statements, admittedly military reservists, were primarily civilian citizens of Michigan where petitioner was a member of the bar. The fact that the statements, for the purposes of the motion, were made on federal property cannot be controlling. Selfridge

2. A copy of Petitioner's court of appeals Brief, Appendix and Reply Brief has been lodged with the Clerk of this Court.

Air Force Base (now Selfridge Air National Guard Base) had thousands of employees, both military and civilian, and had many of the facilities and attributes of a small city, as described more fully in the court of appeals Reply Brief at p. R10. There was thus ample factual material to rebut respondent's affidavit in total, and clearly enough to require an evidentiary hearing.

Barr Distinguished

a. The Solicitor General points out (Resp. 4) that the district court found that the statements made were 'internal' (Pet. App. 6a). This finding, if so, is completely opposite to Mr. Justice Harlan's rationale in his opinion in Barr, which is based on the public's right to know. Justice Harlan found that the statement under controversy, a press release by Defendant Barr, was ". . . a public statement of agency policy in respect to matters of wide public interest and concern . . ." 360 U.S. at 575. The Solicitor General thus is inconsistant in arguing that the privilege should be granted in 'internal' defamations, citing authority based on "wide public interest and concern."

b. The Harlan opinion in Barr contains the statement "The question is a close one . . ." (360 U.S. at 574), and then goes on to recite that the defendant in Barr was the acting director of an important agency in Washington having some 2500 employees (360 U.S. at 574 n.11), and was clothed by redelegation of certain powers conferred upon the President. In contrast, respondent here was a reserve lieutenant colonel, commander of 185 reservists who were tenants on an outlying installation in Michigan, and subject to the direct

operational control of the base commander and higher headquarters. Clearly, if Barr is "a close one," the instant case cannot also be a 'a close one' (Pet. App. 52).

c. This case epitomizes the fears foretold by Chief Justice Warren and Justice Douglas in their dissent to Barr twelve years ago:

> The record will probably (not). . . be satisfactory . . . with little more than bald assertions that a specific official has the power to do what resulted in the defamation . . . Since . . . these duties are rarely enumerated, an executive assertion on the official's behalf may place an impossible burden of proof on the plaintiff seeking to avoid the defense of absolute privilege. 360 U.S. at 579.

In the instant case, there is a bald assertion by the defendant (respondent) that he has the power to defame, but there are no Air Force regulations filed (to enumerate duties) nor are executive assertions filed - but nevertheless petitioner is faced with the impossible burden feared and deplored by Justices Warren and Douglas.

Also noteworthy is Mr. Justice Brennan's dissenting comment, also applicable here, that Mr. Justice Harlan's approach "seems to clothe with immunity the most obscure subforeman on an arsenal production line . . . who maliciously defames one he discharges." 360 U.S. at 587. The instant case is quite close to that omniscient characterization.

Other Inconsistencies and Errors

a. The Solicitor General published an excerpt from a deposition which was taken out of context (Resp. 3). The full text of that deposition showed that the deponent testified that he did not hear the newscast referred to, and thus that point is misleading. Rebutting excerpts from that deposition appear in petitioners court of appeals reply brief at page R2. As respondent's memorandum emphasizes the factual issues, this one is misleading and should be corrected.

b. A number of misstatements of fact appear in respondent's brief. Petitioner is branded as the head of dissidents, (Resp. 3) when there is no basis in the record to describe him as anything more than a 'spokesman'. Petitioner was characterized as criticizing the 'activation' of the reserve unit in the aftermath of the Pueblo seizure (Resp. 2), but the district court record shows that, in oral argument, respondent's attorney (the Assistant United States Attorney) emphasized that any criticism was not of the act of the recall, as characterized by the Solicitor General, but was aimed at the continued involuntary and unnecessary retention on active duty as petitioner's duties had no relationship to the emergency causing the recall. See plaintiff-appellant's Appendix in the court of appeals, P. A8, on file with the clerk of this court.

c. At no time in this matter had respondent ever taken the position that petitioner was not acting in perfect propriety within the scope of his First Amendment privilege. The only characterization of the public statements of petitioner, by respondent, appear in an unrebutted affidavit which attributes the words ". . . Al Wanamaker has embarrassed me

personally . . ." to respondent. At no time in this record or elsewhere has respondent ever identified a specific discipline or morale problem which resulted from public statements made by petitioner, and at no place in this record has respondent alleged that any acts by petitioner were in any way false or in violation of law or any military regulations.

Conclusion

Petitioner further contends that the decision in this case offends basic standards of fairness. It is anomalous that a government employee may have greater rights than members of the public ". . . citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice." 360 U.S. at 589, Mr. Justice Brennan's dissent. Government employees should have no greater rights.

In this reply, petitioner has shown that the Court should grant the Writ of Certiorari as Mr. Justice Harlan's opinion in Barr is not binding precedent, as that opinion has not been uniformly followed by the courts of appeal, and as the decision below sanctioned a departure from accepted judicial proceedings in not requiring an evidentiary hearing.

Respectfully submitted,

Giles A. Wanamaker, Jr.
in propria persona

November 1971